2003

Paul Houghton v. Department of Health : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL HOUGHTON, *et al.*, Plaintiffs/Appellants, v. DEPARTMENT OF HEALTH, *et al.*, Defendants/Appellees.	)	Supreme Court No. 20030931 SC

APPELLANTS' REPLY BRIEF

Interlocutory Appeal to the Utah Supreme Court from the Decision of the Third Judicial District Court of Salt Lake County, Judge Anthony B. Quinn

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INTRODUCTION

There is a problem with the scope of this interlocutory appeal. It was sought, and presumably granted, because the trial court failed to follow this Court's ruling in *ORS v. McCoy,* 2000 UT 39, 999 P.3d 572 (Utah 2000). The Petition identified the **sole issue** as:

> Did the trial court err in ***failing to apply this Court's holdings in Houghton II and McCoy,*** which require the State to pay an attorneys fee where the State recovers its lien from a third-party tort recovery produced by the recipient's attorney?

R. 1767 (emphasis added). Appellees ("the State"), although they filed no counterpetition, seek now to consider several non-*McCoy* issues not addressed in Recipient's Brief (e.g., proper notice of claim). It is assumed that the Court would like to focus this interlocutory appeal on the issue for which it was granted, and that addressing these other issues would be an unnecessary distraction. Therefore, unless notified otherwise, Recipients will address only briefly the State's collateral issues raised in its Points I, II and III.

RESPONSE TO THE STATE'S STATEMENT OF THE CASE

Several allegations in the State's "Statement of the Case" are incorrect or seriously misleading. For example, the State claims:

> It was ***undisputed*** that the named Class II plaintiffs [sic] attorney fees claims ***failed on the merits***. R. 508, 513, 515, 556-58; *Houghton II*, 2002 UT 101 at ¶6.

State's Brief at 6 (emphasis added). This is untrue. These claims did not "fail," but were sustained on the merits:

> [W]e next examine Class II plaintiffs' argument that the district court erred in granting the State's motion for summary judgment and dismissing their claims for attorney fees with prejudice. . . . ***Class II plaintiffs ask us to reverse the district court's grant of summary judgment,*** while the State asks us to simply modify the district court's dismissal so as to be without prejudice, ... ***[W]e are persuaded . . . to accept Class II plaintiffs' proposal. We therefore reverse the district court on the issue of attorney fees*** and remand for further discovery.

Houghton II, ¶10 (emphasis added). Additionally, the pages cited for this "failed on the merits" proposition either reference documents that <u>*preceded*</u> *Houghton II* or simply do not support the proposition for which they are cited.[1]

The State also claims that "This Court ***affirmed the dismissal of all of the [Class II] claims*** . . . with the exception of the attorney fees claims." State's Brief at 5 (emphasis added). This is misleading because the dismissal has no negative affect on the attorney fee claims, as implied by this quote.

Much of the State's recitation of facts and characterization of arguments is similarly unreliable. Additional examples appear below in Points I.A and I.C.

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[1] Four such pages (R. 508, 556-8) relate to the *Defendant's* May, 2000 Motion for Summary Judgment, which <u>*preceded*</u> the *Houghton II* decision by 2½ years. Further, none of the six pages cited even address the State's "failed on the merits" allegations.

ARGUMENT

REPLY POINT I

– Refusal to Follow *McCoy* Justifies Appeal –

THE TRIAL COURT'S REFUSAL TO FOLLOW *McCOY* DOES SERIOUS HARM TO THE CLASS, WHICH JUSTIFIES THIS APPEAL. THE ISSUES IN THIS APPEAL ARE NOT ABSTRACT QUESTIONS SEEKING AN ADVISORY OPINION, BUT REPRESENT A REAL DISPUTE BETWEEN THE PARTIES.

A. Issues Raised.

The State's characterization of Plaintiffs' position is inaccurate and misleading. The first sentence of the State's Point IV is:

> The ***only issue raised by the plaintiffs*** is the proper interpretation of Utah Code Ann. ***§ 26-19-7(4) (1998).***

State's Brief at 16 (emphasis added). That is false. Recipients raised six (6) separate points, argued over 36 pages, having to do with the proper interpretation of *McCoy* and when the State should be required to pay its fair share of attorney fees for obtaining lien reimbursement.[2] To characterize "[§26-19-7(4) as being] the only issue raised" is therefore rather astonishing.

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[2] Recipients argued that: the ***"procuring the settlement" triggers*** the State's obligation under *McCoy* (Point I); there should be no requirement that the State first ***proceed directly against the recipient*** (Point II); ***consent*** to sue should not be a requirement (Point III); ***notice*** should be required (Point IV); the State's ***"using its own resources [attorney]"*** argument is an evasion of *McCoy* (Point V); and recipient ***"cooperation"*** is met by identifying the third party obligor (Point VI).

B. Refusal to Follow *McCoy* Justifies this Court's Intervention.

The State's refusal to follow *McCoy* is illustrated by its persistent mischaracterization of the issues and the taking of anti-*McCoy* positions in various forums. This stubborn defiance, combined with the trial court's refusal to follow *McCoy*, threaten to destroy the class and do substantial injustice.

The trial court's errant ruling dealt specifically with *McCoy* ¶18, holding that the State's obligation to pay a fair share of recipient's attorney fees occurs *only* when "the State elects to recover its claim directly from the recipient." Judge Quinn's Order, R. 1720 ¶ 1. The trial court thereby rejected two *McCoy* holdings, i.e., that ***"securing a recovery"*** triggers the State's obligation (*McCoy* ¶ 18) and that "***each method of recovery*** requires the State to pay its share of [a recipient's] attorney fees." McCoy ¶ 19 (emphasis added); R. 1588-90, 1720 ¶ 1. The failure to follow *McCoy* in these two key respects basically destroys the class and requires immediate correction.

The threat to the class is very evident in the trial court's "tentative ruling" where, because of "misunderstanding" *McCoy*, the trial court noted "[i]t is apparent that regardless of which analytical framework [of *McCoy* interpretation] is adopted, the result is ***problematic for continuing this case as a class action.***" R. 1591 (emphasis and bracketed portion added). Because the trial court has rejected two key elements of *McCoy,* has basically destroyed the

class, and will probably dismiss the class, it makes sense to resolve these interpretation issues now to avoid future appeals.

At least three *McCoy* interpretation issues need this Court's attention, including the State's continuing claims that: a) it may avoid a *McCoy* fair-share attorneys fee contribution by allegedly using **"its own resources" (i.e., attorney)** (State's Brief at 18; R. 763, R. 1798:44-45); b) its **"consent"** is required before it owes a fair share of attorney fees (State's Brief at 18-19; R. 1798:43-44); and c) some heightened **"cooperation"** by the recipient is required. State's Brief at 19; R. 1798:47-86. The fact that the State is still raising the "own resources" and "consent" arguments three years after they were rejected by *McCoy*, highlights why this Court needs to be involved and resolve these issues now, once and for all. Undaunted by *McCoy*, the State still insists on consent and refuses to pay its fair share, even when settlements are procured by the recipients' attorneys. State's Brief at 18-19.

C. ***Walker* Illustrates State's and Trial Court's Rejection of *McCoy*.**

The State cites the recent unpublished Court of Appeals case of *Walker v. ORS,* 2004 UT App. 101 (also a Judge Quinn case), as an example of a court decision where the State "did not have to reimburse a private attorney when it spent its own resources to investigate and seek

reimbursement." State's Brief at 18. However, this decision actually illustrates the State's and the trial court's continued refusal to follow *McCoy*.

The State raised two claims, both rejected by *McCoy,* to wit: "that it should not pay any of Petitioners' attorney fees because it ***expended its own efforts*** to collect on the lien, and ***did not consent*** to Petitioners' representation." *Walker,* p.1, Introductory Paragraph (emphasis added). This persuaded the Court of Appeals, which rationalized: "[a]fter ***denying consent,*** ORS advised State Farm that ***Petitioners' counsel did not represent the State's claim*** and ***demanded direct payment*** from State Farm." *Id.* (emphasis added). Thus, *Walker* ignored this Court's *McCoy* requirement that the law "in no way limits the award of fees to recipients who ***obtain consent."*** *McCoy,* ¶ 18 (emphasis added).

Walker also held, at State urging, that because the "ORS ***spent its own resources*** to investigate and seek reimbursement before any request [for consent] was made by Petitioners' counsel," no attorney fee was owed. *Walker,* p.1. Thus, *Walker* refused to follow another *McCoy* holding that "securing a recovery on behalf of his client" triggers the obligation to pay a fair share of attorney fees. *McCoy* ¶ 18. *Walker* emphasized mechanical, lien-preservation activities to justify denying a fair share ("on its own initiative, ORS discovered the identity of the third party, filed a Notice of Lien, and

obtained State Farm's admission of liability," *Walker,* p.1), while ignoring the substance of who produced the settlement from which the lien was paid.

Walker is "Exhibit A" for why the Supreme Court needs to intervene and "clarify" *McCoy.* The State has steadfastly refused to follow *McCoy.* It carves out for itself unwarranted "exceptions," and parses words to justify its narrow construction of the case. As a result, an incorrect legal standard was again adopted by Judge Quinn to unjustly deny a recipient reimbursement for a fair share of attorney fees for securing a settlement from which the State was paid. It is time for this Court to intervene.

D. Advisory Opinion is Not Sought.

The State accuses Recipients of seeking an advisory opinion as to how *McCoy* "should be interpreted and applied to hypothetical situations." State's Brief at 12. The State then mischaracterizes the trial court's order:

> The district court's ***order dealt solely with what discovery would be permitted*** in relationship with an outstanding motion to decertify the class of plaintiffs.

State's Brief at 12 (emphasis added). Both statements are incorrect. Recipients do not seek an advisory opinion, and the district court's order dealt with far more than what "discovery" would be permitted. R. 1750-53.

Examination of the court's order shows that the issues here are not "abstract" or "hypothetical," and that "there is an actual conflict between

interested parties asserting adverse claims." *Baird v. State of Utah,* 574 P.2d 713, 715 (Utah 1978). The preamble of the order recites that the court was *considering five (5) separate motions*, and in that context "heard oral argument on the holding and meaning" of *McCoy*. R. 1750. The court then notes that it has "read the *McCoy* case and cases related to it, [and] has fully considered the oral argument of counsel on the ***holding and meaning of the McCoy case.***" R. 1751 (emphasis added). Thus, the trial court was viewing the interpretation of *McCoy* as critical to the matters on which he was about to rule. This is anything but "hypothetical."

The trial court then held, relying solely on ¶ 18 of *McCoy,* that class recovery is limited to that narrow band of cases where "the State elects to recover its claim directly from the recipient." R.1752. This is hardly hypothetical because a "Class II plaintiff" is defined as a Medicaid recipient who: had a third-party liability claim, retained an attorney to assist in obtaining a recovery, and received "settlements or judgments" from which the State's Medicaid reimbursement liens were paid.[3] R. 82 ¶ 1; R. 99-100. When the trial court's additional *"recover directly from the recipient"* element is

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[3] The **noncontroversial** parts of this ruling were that the recipient must have received *"medical assistance* [and] hire[d] *an attorney* to recover *damages from a third party."* R. 1752 (emphasis added). Everyone agrees with those requirements.

added, **the class is reduced by about 98.7%.** *See* Point I.E below. That is not hypothetical.

E. Significant, Continuing Damage to the Class.

The State admitted in a status report that the trial court's "recover directly" element **reduces the potential class size by 2,933 possibilities** (from **2,974** potentials to a mere **41**). R. 1789-90.[4] This is a 98.7% reduction in potential class size!

When one considers the balance of the trial court's Order, it is very clear how real and justiciable the actual controversy is here. The trial court applies its narrow reading of *McCoy* ¶ 18, holding that "each Class II representative and member must meet the requirements of paragraph18 of the *McCoy* case ***as construed above.***" R. 1752 (emphasis added). In other words, with one stroke of the proverbial pen, Class II shrank from every Medicaid recipient with a third-party action whose settlement provided lien reimbursement to the State (about 2,974 souls) to only cases where "the State elects to recover its claim directly from the recipient" (R. 1752), or about 41

[4] These figures come from the **State's status report** to the trial court filed in January 2004. The potential class possibilities could be considerably higher than the State admits, but this will not be known until discovery is allowed. Because of objections and appeals, no discovery has been conducted during the nine years of this litigation.

souls. That 98.7% shrinkage probably explains why the State has struggled so mightily all these years to avoid discovery.

F. Actual Conflict Between Parties.

The "actual conflict between interested parties" (*Baird,* 574 P.2d at 715) is further obvious when one considers the balance of the Order and its effect on how the case will be litigated. Paragraph 3 of the Order granted the State's motion for a protective order, *preventing discovery* on the mass of Class II members identified above who had obtained third-party recoveries and who did not receive a fair share attorney fees contribution. R. 1752 ¶ 3. By the same token, plaintiffs' motions to compel discovery of this information and three other related motions were all denied. R. 1752 ¶ 4. The court then drastically limited discovery to "identification of recipients who fall within the holding of the *McCoy* case as ***construed by this Order***,"[5] after which the court would consider the State's motion for ***"decertification"*** of class status. R. 1752-53 (emphasis added). Under such conditions, it is astonishing that the State could claim that Recipients are seeking an advisory opinion.

One of the requirements for obtaining an interlocutory appeal is that the resolution of the issue "involves substantial rights and may materially affect" the litigation. Rule 5(e), Utah Rules of Appellate Procedure. If the

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[5] This would be the 41 against whom "the State elects to recover its claim directly from the recipient." R. 1751-52; R. 1789-90.

McCoy interpretation issue is resolved now, it will vitally affect who is included in the class and the relief to be obtained by over 2,900 people. There is also a good chance that this Court's ruling on this issue will effectively resolve the entire case.

REPLY POINT II

– Fiction of "Recover Its Lien" With "Its" Own Resources –

THE STATE DOES NOT USE "ITS OWN RESOURCES" TO OBTAIN SETTLEMENTS FOR THE RECIPIENT. BY "RECOVER ITS LIEN," THE STATE MEANS THAT IT GETS THE TORTFEASOR'S INSURANCE COMPANY TO PAY THE LIEN DIRECTLY TO THE STATE, AFTER THE SETTLEMENT IS OBTAINED BY A RECIPIENT'S LAWYER.

A. What the State Means by "Recover Its Lien."

The State explains its position as follows:

> Plaintiffs ask this Court to amend *McCoy* to require the State of Utah to pay private attorney fees ***even if the state recovers its lien directly from a third party and not from the Medicaid recipient.*** . . . Plaintiffs ask . . . that the State . . . be required ***to pay the attorney fees for a private counsel who did not assist in the State's recovery.*** . . . [S]uch a rule would encourage the State of Utah to never seek to ***recover its lien*** from the liable third party. The State [should not] ***have to pay for a private attorney whose services it did not use*** . . . when it spent ***its own resources*** to investigate and seek reimbursement.

State's Brief at 17-18 (emphasis, double emphasis and brackets added). By "recover its lien" with "its own resources," the State means the mechanical

process of getting money transferred from the tortfeasor to the State, after the recipient has settled. **It does not mean procuring the settlement** from which the lien is ultimately paid. In other words, if the State **denies** the recipient's attorney **consent** to prosecute its claim and **sends** the insurance company **notice** of its lien, the State deems that it "recovers its [own] lien," even though the recipient's attorney did all the work to secure the settlement.

B. False Impression.

The State promotes this as a no-brainer fairness issue: in essence, why should the State pay a share of recipient's attorney fees when the State "recovers its lien" with "its own resources"? Interestingly, the language in the State's Brief is parsed very carefully. It conveys the *impression of State settlement procurement,* without actually making the assertion. The impression left by a quick read of the quoted passage is that the State's agents did the work ("spent its own resources") to *generate a settlement* ("recovers its lien"), from which the recipient somehow gets a free ride ("pay for a private attorney") by unjustly recovering a share of his/her attorney fees at State expense ("whose services it did not use").

Why is this "impression" false? The State virtually never "procures a settlement" (or judgment). Recipients' counsel, as an officer of the court, can represent to this Court that in 30 years of personal injury practice

(1974-2004), he has never seen a single instance where the State has "procured a settlement" from a third-party tortfeasor in a Medicaid reimbursement case.[6] R. 1798:62. In nine years of litigation in this case, counsel does not recall any specific assertion by the State that it actually "procures settlements," but it does leave that impression.

Typical fact patterns of Class II members would be similar to those in *McCoy* and *Walker*. In *McCoy*, the recipient was injured in July, 1993 in a fall at K-Mart. He could not pay his medical bills so he received medical assistance from the State in the amount of $8,800. *McCoy* ¶ 2. The recipient contacted and retained Attorney John McCoy, who immediately contacted the ORS requesting consent to bring the action. The ORS declined consent in July, 1994, "stating that ORS would seek full recovery directly from any liable third parties," and then sent a lien notice to K-Mart. *McCoy* ¶ 3. The ORS then sent a lien notice to K-Mart. *McCoy* ¶ 3. A year later, in July 1995, two years after the accident, McCoy demanded settlement from the property owner's insurer, and eventually settled the case in October, 1995, about 2½ years after injury. *McCoy* ¶¶ 4, 5. The State did nothing to "secure the settlement," but claimed that "McCoy lacked consent" and that it was free to "demand[] payment from the recipient's settlement proceeds . . . [and] does not

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[6] Nor has counsel ever heard of this occurring from the many other attorneys he knows who practice similar law.

have to pay a share of McCoy's attorney fees in securing that settlement." *McCoy* ¶ 15. History repeats itself, as these are the same claims made in *Walker* and *Houghton II.*

Basically, when the State withholds consent, but gets paid at the end of a case from the efforts of the recipient's counsel, the State defines this as having "recovered its own lien" by using "its own resources," adroitly evading the requirements of *McCoy* that consent is not necessary and that ***"each method of recovery*** requires the State to pay its share of [a recipient's] attorney fees." *McCoy* ¶¶ 18, 19 (emphasis added). The State justifies this as "recovering its lien" rather than "recovering a settlement." If this rationalization is accepted, *McCoy* is meaningless for most recipients.

C. Securing Settlement Should Trigger the Obligation.

The basic difference between the State's approach and the *McCoy*/Recipients' approach is **what triggers the State's obligation** to share the recipient's attorney fees. The *McCoy*/Recipients' approach is that the recipient is "entitled to recover attorney fees from the State ***for procuring the settlement.***" *McCoy* ¶ 13 (emphasis added). *McCoy* characterizes Utah Code Ann. § 26-19-7(4), the authorizing statute, as having a "relatively broad reach." *McCoy* ¶ 18. The *McCoy* court noted that it would be "inherently unfair not to award attorney fees to McCoy, who ha[d] followed the requirements of the

Act ***in securing a recovery*** on behalf of his client." *McCoy* ¶ 18 (emphasis added). The trigger is "securing a recovery."

On the other hand, the State takes the position that "securing a recovery" does not trigger the obligation to share attorney fees, but only the State's "consent" can trigger the obligation to share attorney fees. The obligation is never triggered, according to the State, if the State notifies the tortfeasor's insurance company of its lien and demands direct payment, **even if the actual settlement from which its lien is paid is generated entirely by the recipient's counsel.**

This Court should reject the State's approach for several reasons. *First, stare decisis* should prevail. *McCoy* has already decided this issue, holding that ***"each method of recovery*** requires the State to pay its share of [a recipient's] attorney fees." *McCoy* ¶ 19 (emphasis added). *Second,* justice and sound public policy require that attorney fees reimbursement be based on something of real economic substance, i.e., for "securing a recovery on behalf of his client" (*McCoy* ¶ 18), as opposed to filing a lien notice. Incidentally, this is in keeping with many other areas of law where attorney fee payments by government agencies or insurance companies as a "cost of procurement" are

very common.[7] In fact, virtually all State Medicaid statutory schemes provide specifically for payment of attorney fees.[8]

A *third* reason to reject the State's approach is that it creates a needless legal fiction that is not based on economic reality or justice. The State claims it should not "have to pay for a private attorney whose services it did not use" to "recover its lien," all the while receiving the proceeds from the settlement secured by the recipient! Such a fiction enthrones form over substance and undoes the justice of the *McCoy* case. *Fourth,* this approach makes *McCoy* exceptionally easy to evade by the State arbitrarily withholding

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[7] *See,* for example, *Esquivel v. Labor Com'n of Utah,* 2000 UT 66, 7 P.3d 777, 782 (Utah 2000) (in a third party recovery by injured worker in **worker's compensation** context, "the employer or insurer must . . . bear a proportionate share of the expenses for obtaining the recovery"); *Stewart v. Utah Public Service Com'n,* 885 P.2d 759, 782 (Utah 1994) ("a court has **inherent equitable power** to award reasonable attorney fees when it deems it appropriate in the interest of justice and equity"); and *Cochran v. U.S. Healthcare Financing Administration,* 291 F.3d 775, 778 (11th Cir. 2002) ("**Medicare** regulations . . . provide that, when Medicare is reimbursed out of a judgment or settlement, the amount of money it takes is reduced by pro-rata share of the 'procurement costs' which include attorneys' fees of the judgment or settlement. 42 C.F.R. § 411.37(c) (2002)") (emphasis added).

[8] *See,* for example, **New Jersey** Stat. § 30-4D-7.1(b) (2004): Every recipient or his attorney must promptly pay the full proceeds of the settlement against a third party "subject to a pro rata deduction for counsel fees, costs, or other expenses incurred by the recipient or the recipient's attorney"; and Vernon's Annotated **Missouri** Statutes 208.215.9(1): The amount of the lien recovery is subject to "subtracting from the gross amount of the recovery the total attorney's fees and other costs incurred by the recipient incident to the recovery"; a court shall determine whether Medicaid "should, as a matter of fairness and equity, bear its proportionate share of the fees and costs incurred to generate the recovery."

consent, "notifying" the tortfeasor's insurer of its lien, and simply waiting for the recipient to do the work to generate the money. The State's position reflects a disdainful rejection of *McCoy* and is impractical, unworkable and unfair.

D. Possible Exceptions?

Hypothetically, what if the State could prove that it did in fact secure an actual settlement (as opposed to simply "recovering its lien" after the recipient procures the settlement)? The answer is simple: such a recipient is not a class member and would not be entitled to a fair share of attorney fees.

Having said this, Recipients urge caution here, should the Court's opinion address this issue. Any language in the opinion so holding would have to be exceptionally clear, and require that the State would have to actually generate the underlying settlement, not just payment of the lien. Because of the history of this case, Recipients suggest that the State should have the *burden of proving* that it generated the actual settlement, and that there be a strong *presumption that the recipient generated the settlement* where the recipient has counsel before an offer of settlement is made. Without such clarifications, the history of the case suggests that the State would use this exception to swallow the rule, and attempt to defeat commonality and destroy the class.

REPLY POINT III

– Notice Was Adequate in All Respects –

CLASS II PLAINTIFFS, THOUGH NOT REQUIRED, PROVIDED NOTICE THAT COMPLIED WITH THE GOVERNMENTAL IMMUNITY ACT. THE STATE WAIVED ANY TECHNICAL DEFECTS IN THE NOTICE. EVERY CLASS MEMBER IS NOT REQUIRED TO BE NAMED IN A NOTICE.

A. Procedural Note.

The issues raised by the State with respect to notice were briefed extensively below (R. 924-35), argued to and denied by Judge Nehring (R. 1798: 1-42, 82), and not revisited by Judge Quinn. R. 1583-92; R. 1718-21. The State never sought interlocutory appeal on this issue, but simply raised it in State's Brief at 8-12. There is not enough space in this Reply Brief to fully address these notice issues in the detail in which they were addressed below. A 30-or-so page response is found below in R. 1618-27 and 1614-38, which is incorporated herein by reference if the Court wishes more detail and case authority. Otherwise, the following constitute the highlights of what was presented.

B. Notice of Claim Not Required for Non-Injury or Equitable Actions.

The Notice of Claim[9] in this case was filed only as a precaution, to avoid unnecessary delay. R. 835. Notice under the Governmental Immunity Act is only required for a defined "injury." *See* Utah Code Ann. § 63-30-3 (1991). "Injury" means "death, injury to a person, damage to or loss of property." Utah Code Ann. § 63-30-2(5). For example, a "claim for an adjustment on . . . property taxes is neither an 'injury' as defined in § 63-30-2(6) nor is it an 'action under this act.'" *Jenkins v. Swan,* 675 P.2d 1145, 1154 (Utah 1983). "[E]quitable claims of this nature for assessments made 'without authority of law,' are exempt from the notice requirements." *Jenkins,* 675 P.2d at 1154. Class II Plaintiffs in this case seek return of monies wrongfully taken by the State, which is not a defined "injury" and is "equitable" in nature. Black's Law Dictionary, 5th Ed. 1989, p. 482, 484. Accordingly, Recipients are exempt from notice requirements.

C. Adequate Notice Given; Strict Compliance Observed.

The State incorrectly claims the notice was insufficient because it "did not assert a claim for attorney fees pursuant to Utah Code Ann. § 26-19-7(4) (1998)." State's Brief at 11. This is a serious misstatement of fact and law. All that is required of a notice of claim is a "brief statement of the facts,"

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[9] The full notice served about July 19, 1995, contained **a signed specimen complaint** of over 30 pages in length. *See* R. 834-72.

a setting forth of "the nature of the claim asserted," and a statement of "the damages incurred . . . so far as they are known." Utah Code Ann. § 63-30-11(3)(a). The statute does not require an exact statutory cite, as alleged by the State. "There must be enough specificity in the notice to inform as to the nature of the claim so that the defendant can appraise its potential liability." *Yearsley v. Jensen,* 798 P.2d 1127, 1129 (Utah 1990). The "nature of the claim" is simple:

> Claimants demand . . . any interest, costs and ***attorneys fees*** as will reasonably place the claimants in the position they would have been had the State not taken their property.

R. 837 ¶ 14 (emphasis added).

The Notice incorporates by reference "a more detailed statement of facts . . . ***[in] the attached draft of a complaint,*** . . . Exhibit 'A' which the claimants intend to file." R. 836 ¶ 9 (emphasis added). There are multiple additional claims for attorney fees in the "draft complaint."[10] For example, ¶ 53 states: "Plaintiffs are entitled to ***attorneys' fees as may be provided by law,*** including 42 U.S.C. § 1988." R. 852 (emphasis added). Paragraph 133 asks for an award of "a reasonable attorneys fee" and that "Plaintiffs are entitled to not only a reasonable attorneys fee, but reasonable expert fees."

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[10] It should be noted that the draft "complaint" attached to this notice (R. 838-872) was not filed at that time. An almost identical version with the same 133 allegations was filed later, after the 90 days had expired. R. 1-39.

R. 870. In the *ad damnum* clause, ¶¶ 8 and 10 each request "attorneys' fees as allowed by law." R. 871-72.

Clearly, this Notice suffices to advise the State that Recipients were asking for attorney fees. Judge Nehring found it adequate. R. 1798: 82. The State cites no authority requiring citation to an exact Code provision. This Notice clearly identified "attorney fees" as part of "the nature of the claim asserted" and "the damages . . . so far as they are known" and was sufficient under the statute. Utah Code Ann. § 63-30-11(3)(a). The State misconstrues "strict compliance" with the Act, which refers not to the form of notice, but to such things as the timely filing of the notice, service on the appropriate person, etc. *Wheeler v. McPherson,* 2002 UT 16, 40 P.3d 632, 635-37 (Utah 2002) ("strict compliance" is failure to verify a notice under oath; filing a claim one day late; and failure to file the claim with the appropriate official).

D. State Waived Right to Object to Form of the Notice.

The State believes that the *form of the notice* is "jurisdictional," that the notice is somehow deficient in form, and this is therefore fatal to plaintiffs' claims. State Brief at 8. This is wrong. Some aspects of notice are jurisdictional, but not the *form of the notice.* The Utah Court of Appeals has held that the requirement of notice is not jurisdictional, but an ***affirmative defense.*** *Hart v. Salt Lake Co. Com'n,* 945 P.2d 125, 132 (Utah App. 1997). The defense may be waived if not raised under Rule 12(h), Utah R.Civ.P.

Olpin v. Grove Fin. Co., 521 P.2d 1221 (Utah 1974). "Immunity is an affirmative defense which must be proved by the defendant," and may be lost if not proved by defendant. *Nelson v. Salt Lake City,* 919 P.2d 568, 574 (Utah 1996). In *Hart,* Salt Lake County had waived the governmental immunity affirmative defense. *Hart,* 945 P.2d at 133.

An examination of the defendants' original Answer reveals that there is no specific raising of the alleged failure of the form of the notice. R. 66-77. Governmental immunity is raised only generally in the Fifth and Sixth Defenses. The Fifth and Sixth Defenses are merely boilerplate defenses that deal with the strict compliance issues, which are obviously met herein. There is no mention in the Sixth Defense of any defective notice, or anything remotely similar to what the State raises in its motion. R. 74-75. Accordingly, the governmental immunity affirmative defense has been waived.

E. Naming of Every Class Member Not Required.

The State argues incorrectly that the notice is insufficient because it does not "contain the names of all plaintiffs" (State's Brief at 9) and cites *Pigs Gun Club, Inc. v. Sanpete County*, 2002 UT 17, 42 P.3d 379 (Utah 2002). The case is clearly distinguishable because the notice there had the names of only two of the five plaintiffs named in the Complaint. The Court held that the failure to name the other three individual plaintiffs on the notice of claim resulted in a lack of jurisdiction for those plaintiffs. *Pigs Gun Club*, however,

did not deal with a **class of plaintiffs,** like the instant case, where the named class representatives filed a timely notice of claim that was effective for all class members. The very reason class action lawsuits are allowed is to facilitate claims where "the class is so numerous that joinder of all members is impracticable." Rule 23(a), Utah R.Civ.P. As a practical matter, the State's position would repeal Rule 23(a) because it would be virtually impossible to discover and name every potential class member in a governmental immunity notice. *Pigs Gun Club* did not intend that result.

The State's claims also run counter to other Utah Supreme Court precedents. For example, in *Stewart v. Utah Publ. Serv. Comm'n,* 885 P.2d 759, 782 (Utah 1994), the court sustained "a class action ***against the state*** for a monetary award that benefitted the entire class" (emphasis added). In *Plumb v. State,* 809 P.2d 734 (Utah 1990), the Court dealt with the thrift scandal of the late 1980's. Plumb, as a named plaintiff, represented a class consisting of approximately 7,000 persons holding 17,000 accounts in five failed Utah thrift institutions, all with claims **against the State.** It was apparently clear as a matter of law that these claims were not barred by governmental immunity.

CONCLUSION

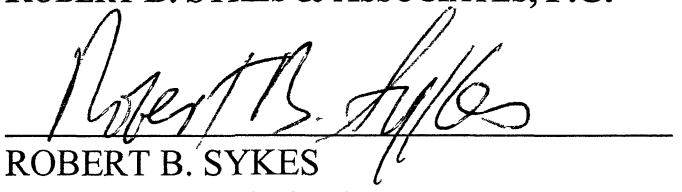
The trial court's ruling has a tremendously adverse negative impact on the class of claimants in this certified class action. It reduces the class by about 98.7% and thus presents an actual conflict between the parties.

The trial court has declined to follow *McCoy,* which requires the State to contribute to a successful recipient's attorney fees when the recipient's attorney secures a settlement from which the State's lien is paid.

Although notice was not required to be filed in this case, it was filed and adequately disclosed a claim for attorney fees.

DATED this 6th day of August, 2004.

ROBERT B. SYKES & ASSOCIATES, P.C.



ROBERT B. SYKES
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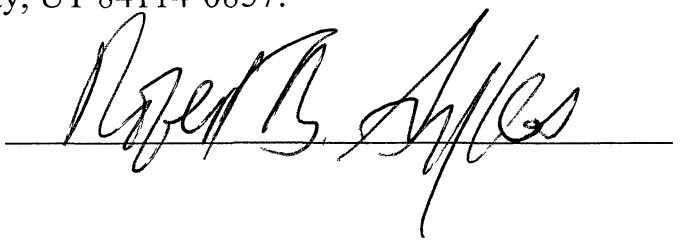
CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies y of the foregoing **Appellants' Reply Brief** were served upon counsel for Defendants/ Appellees by hand delivery on this 6th day of August, 2004, addressed to William F. Hanson, Office of the Utah Attorney General, 160 East 300 South, 6th Floor, P.O. Box 140857, Salt Lake City, UT 84114-0857.



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